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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 656.

SINCLAIR & CARROLL COMPANY, INC.,
Petitioner,

v.

INTERCHEMICAL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The opinion below is reported at 144 F. (2d) 842.

The Petition asks this Court to review a unanimous decision of the Circuit Court of Appeals for the Second Circuit sustaining a patent for a printing ink which "involved a highly important step in the art" and "satisfied a long felt want" and "was not the product of a pedestrian worker in a laboratory but of a chemist of imagination who was able to conceive of and employ a solvent that had" "apparently inconsistent attributes" (144 F. (2d) 847). This decision is attacked by assertions in direct conflict with facts stated in the court's opinion and established by the record. A restatement of the case is necessary to correct the inaccuracies and omissions in the statement on pages 1 to 15 of the Petition.

STATEMENT.

The Patented Ink.

The patented ink is used in ordinary printing—relief printing from raised type and raised dots[1]—and the statements which follow relate to such printing:

Most printing is still done by means of linseed oil inks which take several hours to dry (I, p. 227), but the patented ink has replaced linseed oil inks in particular fields where high-grade printing is done at high speed.

High-speed rotary printing presses, like those used today, were in general use for at least thirty years before 1932[2]. They were used solely for printing on soft, absorbent paper, like newspaper[3]. They could not be used for high-grade printing on smooth paper because there was no printing ink which could be instantly dried[4]. Attempts to do high-grade printing on high-speed presses began at least as early as 1917 and were all failures up to 1932[5].

In May 1932, the printing ink made by the patentee, Gessler, and described in the specific example of the patent was demonstrated on a commercial high-speed press[6]. After this demonstration, the new ink was duplicated by several of those to whom it had been disclosed, sometimes with the same materials used in the specific example of the patent and sometimes with cheaper materials having the same

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[1] Sometimes termed "typographic printing" or "letter-press printing" to distinguish it from the printing from engravings known as "rotogravure" which has been done on high-speed presses provided with heaters since long before the patented ink was invented (I, p. 97).

[2] Use in 1916-1917, I, p. 148. Forty-year old press, I, p. 605.

[3] I, pp. 361, 601.

[4] I, p. 587, Q. 24, p. 625, Q. 28; pp. 110, 148, 531-532, 562-563.

[5] I, pp. 149-153, p. 615, XQ. 47, II, p. 990.

[6] I, pp. 71-80.

physical properties.[7] The use of the ink spread rapidly until by 1935 it was in use by many high-grade illustrated magazines of wide circulation.[8]

The ink so used stems directly from Gessler's first ink. No one before 1932 was able to produce an ink for printing on smooth paper on high-speed presses, and since that date no one has produced such an ink without information derived from Gessler's disclosure.[9]

Before 1932, it was believed to be impossible to select an ink solvent which would produce a quick-drying ink for high-speed presses. Such an ink must travel in a thin film over a long series of ink rollers without drying enough to change its consistency at all,[10] and must be instantly dried on the paper at a temperature which will not scorch the paper. An article published shortly before Gessler's invention pointed out that such an ink could be made if there were a solvent which was non-volatile at room temperature and boiled off[11] at the temperature to which paper may safely be heated, and that there was no such solvent in existence.[12]

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[7] I, pp. 164-167, 170-173; 176-177, 185-194, 216-218; pp. 76, 78-83, 86, 88, 100-101, 136-137, 640-641; pp. 84-87.

[8] I, pp. 87-88, 113, 701, 713-715; pp. 588-590, 598-601, 640-641; pp. 147, 151-156; pp. 235-238, 634-637.

[9] See citations in footnote 7 above, and I, pp. 97, 99; 396-397, 400-401; 363-368, 370, 563-569.

[10] This requirement did not exist in rotogravure printing (I, p. 97, II, p. 1095). This accounts for the fact that high-speed rotogravure printing was possible before the Gessler ink was invented.

[11] See reference to "boiling temperature" in third paragraph of second column on II, p. 990. The solvent was boiled off in the hot stamping of titles on bookbindings (II, p. 964, ll. 84-99; I, pp. 690, 692).

[12] II, p. 990, 2nd col., 2nd, 3rd and 4th paragraphs. The third paragraph beginning "If we could only flatten the curve of a high boiling solvent," etc. dismisses the possibility of finding a solvent which would make the ink work so "flatten" the vapor pressure curve of the solvent means to change its inherent properties. The author

Gessler discovered and disclosed that it *is* possible to produce the desired ink by selection from known solvents. He discovered that instantaneous drying does *not* require a solvent which boils at the temperature to which paper may be heated, but may be obtained by a solvent which has the properties of a volatile liquid like alcohol at this temperature, and that there is a small class of solvents which have this property and also the property of being practically non-volatile at room temperature (See specification of patent in suit, II, pp. 733, 733a).[1]

The Claims of the Patent.

The claims in issue[2] state by way of introduction "A printing ink which is substantially non-drying at ordinary temperatures and dries instantly on heating of the printed matter"; but, unlike the claims which this Court has condemned for uncertainty in *Holland Furniture Co.* v. *Perkins Glue Co.*, 277 U. S. 245, *General Electric Co.* v. *Wabash Co.*, 304 U. S. 364, and *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228, they do *not* attempt to define the scope of the invention by this statement of "the use or function of the product itself".[3]

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and everyone else knew that this was impossible. His statement is just like saying, "If we could only raise the freezing point of water, we could skate all summer".

After dismissing the possibility of using an existing solvent, the author suggested in the fourth paragraph a complicated research in an effort "to get the effect by indirect means". This research came to nothing for Dr. Gessler showed how to obtain the desired effect by direct means, that is, by selecting the right class of existing solvents.

[1] Vapor pressure of typical volatile liquid referred to on last line of first column of II, p. 733a, 4 cm., is far below the vapor pressure of 76 cm. (30 inches) of all liquids when boiling (I, p. 27; see also I, p. 708).

[2] Claims 3, 10, 11, 12, 13 (II, pp. 733b-c).

[3] 277 U. S. p. 256.

The scope of the claims is definitely limited to Gessler's discovery. He pointed out that the long desired ink could be made by selecting a known solvent from a small class having special and peculiar physical properties. The claims define this characteristic ingredient of the ink by the physical property referred to in the specification. They give the range of "vapor pressure" of the solvent, stating limits at two different temperatures. They thus define the new product in precisely the manner in which this Court has stated that such a product should be defined:

> "One was to describe the product by *describing its characteristic ingredient with particularity.* * * * he did this by indicating *the range of water absorptivity*, or stated in another way the degeneration, of the starch ingredient in Perkins' glue. * * * The glue made of this ingredient *within the specified range was a new product.* * * * As such it was entitled to the protection of a patent" (*Holland Furniture Co.* v. *Perkins Glue Co.*, 277 U. S. 245, 255).

In defining the vapor pressure range of the solvent ingredient, the patent claims avoid the use of artificial or arbitrary limits which could not correspond to the physical phenomenon which the patentee had discovered:[1]

(1) The low temperature limit requires a solvent with a vapor pressure as low as that which the illustrative

[1] "A patentee may not arbitrarily select a point in a progressive change and maintain a patent monopoly for all operations in that progressive change falling on one particular side of that arbitrarily selected point. It is only where the selected point corresponds with the physical phenomenon and the patentee has discovered the point at which that physical phenomenon occurs that the maintenance of a patent monopoly is admissible. A claim must be based on invention. The claim to invention depends here upon an alleged discovery of certain limits or points which do not exist in fact and there is therefore no invention." (*Kwik Set.* v. *Welch Grape Juice Co.*, 86 F. (2d) 945, 947.)

solvent has at low temperature. This limit is so definite that it might appear arbitrary, but the proof shows that it corresponds to Gessler's discovery.[1]

(2) The high temperature limit requires that the solvent, when raised to a temperature of 150°C., have a vapor pressure which "approximates that of ethyl alcohol at ordinary temperatures". This limit corresponds to Gessler's discovery that instantaneous ink drying required, not boiling away of the solvent, but merely that

> "at elevated temperatures,[2] this solvent becomes a highly volatile liquid like such highly volatile liquids as, for example, ethyl alcohol" (Specification of Gessler patent, p. 2, col. 1, ll. 72-75, II, p. 733a).

While alcohol (v. p. 4 cm.) is a typical highly volatile solvent, there are many others. Two others, butyl acetate (v. p. 1.5 cm.) and toluol (v. p. 2 cm.) were demonstrated at the trial. The court tests proved that both butyl acetate and toluol have substantially the same volatility as alcohol (I, pp. 662-666). Thus, the highly volatile solvents of which alcohol is typical, have vapor pressures which approximate

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[1] The low temperature vapor pressure of the illustrative solvent, diethylene glycol monobutyl ether, or butyl carbitol, is the limit stated in the claims. Solvents having vapor pressures slightly above the limit include butyl cellosolve, carbitol and terpineol. Inks made with butyl carbitol are successfully used without any drying on the rollers (I, pp. 71, 75, 78, 81, 113, 132, 199-200, 210, 212, 229-230, 234, 706-707). Inks made with butyl cellosolve and carbitol dry on the rollers of the press (I, p. 707). The terpineol ink of the McElroy patent demonstrated on a press by petitioner proved to have had two-thirds of its terpineol replaced by a solvent having a lower vapor pressure (I, pp. 537, 668, II, p. 757).

[2] The elevated temperatures referred to are from 100° C. to 150° C., and the table in the specification shows that at such temperatures the vapor pressure of the solvent rose from just below 1 cm. to 6 cm., that is, it varied a few centimeters *each way* from the vapor pressure of alcohol (4 cm.) which it equals at 140° C. (I, p. 32).

that of alcohol within a few centimeters,[1] so that the expression used in the claims is not an artificial limit but accurately defines to one skilled in the art one of the essential qualities of an ingredient of the ink disclosed in the specification.[2]

Infringement.

Petitioner's ink was made long after the patented ink had gone into extensive use,[3] was based on the Gessler disclosure, acts just like the patented ink on a high-speed printing press,[4] and contains a solvent whose vapor pressure range is within the limits specified in the Gessler claims. Its vapor pressure is within the low temperature limit

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[1] The use of the word "approximates" to cover this small range and thus make the claim commensurate with the invention under the physical facts presented in no way resembles the situation considered by this Court in *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228, where the novelty claimed was in the size of the particles of the final product, and the patentee sought to cover large and small particles whose diameters differed in the ratio of 25 to 1 (317 U. S. 234).

[2] The claim is thus more definite than is required by the decisions of this Court. It does not use "terms of effect or result", although this Court has recently held the use of such terms permissible:

> "A limited use of terms of effect or result, which accurately define the essential qualities of a product to one skilled in the art, may in some instances be permissible and even desirable * * *." (*General Electric Co.* v. *Wabash Co.*, 304 U. S. 364, 371.)

This language apparently referred to an effect or result of the complete product rather than to a description of an ingredient of the product such as is referred to in the Holland Glue case *supra*, for this Court added:

> "but a charactertistic essential to novelty may not be distinguished from the old art solely by its tendency to remedy the problems in the art met by the patent". (304 U. S. pp. 371-372.)

The Gessler claims would not contravene this statement, even if they were construed to define the high temperature vapor pressure limit of the solvent in "terms of effect or result", for the volatility of the solvent at 150° C. is only *one* of the *two* "apparently inconsistent attributes" (II, p. 1103) of this ingredient required to make the ink which remedied the problems in the art.

[3] I, pp. 513-515, 531-532.

[4] I, pp. 237-238; pp. 32-40, 51.

stated in the claims,[1] and at the high temperature mentioned in the claims (150° C.) it has a vapor pressure of 2 cm. which is equal to that of the liquid, toluol, which has the same volatility as the typical highly volatile liquid, alcohol,[2] so that it clearly approximates the vapor pressure of alcohol and is within the Gessler patent.

Prior Patents and Publication.

The prior patents relied on by the petitioner consist of (1) a patent issued in 1888 for an ink which would bite into celluloid, (2) two patents issued in the early 1920's for an ink for use in the hot stamping of bookbindings, and (3) a patent for an unsuccessful quick-drying ink totally different from Gessler's. No one of these patents discloses an ink within the claims of the patent in suit or any ink capable of use to obtain high-grade printing on a high-speed press.[3]

The prior publication cited by petitioner directed the art away from the Gessler invention by indicating that the quick-drying ink problem could not be solved by the selection of an existing solvent and suggesting a long research into plastics which led nowhere.[4]

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[1] I, p. 51.

[2] I, pp. 306, 665-666.

[3] The disclosure of the prior patents and the evidence in regard to these patents is set forth in detail in the opinion of the Circuit Court of Appeals at 144 F. (2d) 844-45; II, pp. 1098, 1099, 1100. The proofs supporting the Court's statements are found at the following points in the record:

Lefferts patent: I, pp. 327-328, 330, 332, 660-662, 682;
Doughty and McElroy patents: I, pp. 309-310, 517, 534-537, 558, 571, 656, 658-659, 668, 689-695, 709-710;
Jirousek patent: I, pp. 359-361; 670.

[4] See footnote 12 on page 3 *ante*.

None of the prior art told how to select a solvent for compounding an ink which would not dry on the rollers of a press and could be dried instantly on the paper. None of the prior art anticipated or even "foreshadowed" Gessler's invention.

Proceedings.

District Court: The case was tried on January 18, 19, 20, 21, 22, 25, 26 and 27, 1943 before Judge Symes of Denver, sitting by special designation in the District Court for the Southern District of New York. Four months after the trial, the district judge handed down a long opinion (50 Fed. Sup. 881; II, pp. 1024-1047) containing inconsistent[1] statements some of which were in direct conflict with the testimony,[2] and accompanied this with so-called findings of fact (II, pp. 1048-1049) which were not discussed in the opinion nor based on the record, but were mere brief summaries of defendant's arguments. One finding, that as to non-infringement, was directly contrary to a ruling made by the district judge after a full argument during the trial.[3]

On appeal, the Circuit Court of Appeals for the Second Circuit (Judges Clark, Augustus Hand and Swan) recognized that the so-called findings of the district court were clearly erroneous, made a thorough study of the record,

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[1] For example, the statement of the "status of the art when the invention in question appeared" in the second paragraph on II, p. 1026, contradicts the statement of the prior art in the first paragraph on II, p. 1040.

[2] The statements as to the prior patents (II, pp. 1034-1038) relate only to the general statements in the patents as to problems which were unsolved and are contradicted by the specific disclosures of the patents and the proofs in regard to them which were considered in detail by the Circuit Court of Appeals, 144 F. (2d) 844-45, and are cited in footnote 3 on page 8.

[3] I, pp. 239-244.

pointed out the errors in the district court's findings, and found facts which require a holding of validity and infringement under all relevant decisions of this Court:

The opinion of the Circuit Court of Appeals (144 F. (2d) 842; II, pp. 1094-1104) shows the care with which the Court studied the record: It recites only facts directly supported by testimony and refers to passages in the record which were not cited in the brief of either party.

The opinion points out in detail that the record shows the district court's findings as to the prior patents to be clearly erroneous (144 F. (2d) 844-45; II, pp. 1097-1100), and by a detailed discussion of the evidence on the matter of infringement shows the clear error in the district court's finding on that matter (144 F. (2d) 846-47; II, pp. 1101-1103).

From its thorough consideration of the record, the Circuit Court of Appeals for the Second Circuit found:

(1) That the printing ink of the Gessler patent in suit "involved a highly important step in the art" and "satisfied a long felt want" (144 F. (2d) 847; II, p. 1103), and "the record clearly establishes that the trade had long striven to secure an ink that would maintain its consistency on the rollers until the web was imprinted and would then instantly dry on application of a sufficient amount of heat but had never succeeded in obtaining such an ink until Gessler made his invention" (144 F. (2d) 843; II, p. 1096).

(2) That the making of the patented printing ink "involved more than ordinary talent" and "was not the product of a pedestrian worker in a laboratory but of a chemist of imagination who was able to conceive of and employ a solvent that had the apparently inconsistent attributes" required to make the desired ink, and that the

patent defined a class of solvents which could be used (144 F. (2d) 847; II, p. 1103).

(3) That petitioner's infringing ink "was undoubtedly compounded with Gessler's teaching in view" and contains the solvent defined in the claims of the patent (144 F. (2d) 847; II, p. 1103).

Petitioner cites no decision of this Court holding that in this state of facts a patent should not be held valid and infringed,[1] and we confidently assert that there is no such decision.

REPLY TO PETITIONER'S ARGUMENTS.

The Petition attacks the decision of the Circuit Court of Appeals on the basis of assertions which are directly contrary to the fact findings of that court. Thus, where the court found that the Gessler ink "involved more than ordinary talent" and was the product of "a chemist of imagination" (144 F. (2d) 847), the petitioner asserts that it required "only ordinary skill of a very low order" (p. 9). Where the court found that the record showed that the invention "satisfied a long felt want" which the

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[1] In *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, this Court dealt with a mechanical gadget which involved no more skill "than that to be expected of a mechanic skilled in the art". This would correspond to "the product of a pedestrian worker in a laboratory" and is wholly different from an invention which required "a chemist of imagination who was able to conceive of and employ a solvent that had apparently inconsistent attributes".

In *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon Corp.*, 294 U. S. 477, there was involved neither "imagination" on the part of the alleged inventor nor the satisfaction of a "long felt want".

The facts found by the Circuit Court of Appeals are similar to those passed on by this Court in *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, *Diamond Rubber Co.* v. *Consolidated Rubber Tire Co.*, 220 U. S. 428, and other cases where patents have been sustained.

prior art could not fill (144 F. (2d) 843, 847), the petitioner asserts that "the record here fails to show that there was any long felt or generally recognized want" (p. 21).

The arguments by which the petitioner supports its three points are based on erroneous statements which run all through the portions of the Petition entitled "STATEMENT" and "FACTS" (pp. 1-4, 6-15). They are not supported by the record and, for the most part, not even by the so-called fact findings of the district court whose decision was reversed. They can be met by showing their inconsistency with the proofs in the record and, insofar as is possible within the confines of this brief, we shall direct attention to the proofs which refute them.

Petitioner's Point I.

Petitioner's assertion that Gessler's ink "at best requires only a low order of skill" (p. 19) is based principally on three statements in conflict with the record.

1. The repeated assertion that all Gessler did was to "compound" an ink of known materials of known properties is misleading in that it omits the fact that the so-called "compounding" was based on discovering and disclosing *how to select* the principal ingredient of the compound—a vital point on which the prior art gave no information (*ante*, p. 8).[1]

2. The second erroneous statement used to attack the decision of the Circuit Court of Appeals on validity relates

[1] Petitioner's discussion of the prior patents (pp. 9, 10, 11) contains fragmentary quotations from the patents and ignores the facts considered by the Circuit Court of Appeals in its discussion of the prior patents (144 F. (2d) 844-845; II, pp. 1098, 1099). These facts (which are established by the record, *ante*, p. 8) show the error in petitioner's assertion that two of the prior patents disclose inks within the claims of the Gessler patent.

to the use of heaters on printing presses. Petitioner cannot ignore the great advance made in magazine printing on introduction of the Gessler ink, but seeks to attribute this advance, not to the ink, but to the heating devices by which the ink is dried. The Petition contains the naive statement "no one *seems* to have provided the fast presses with heating devices to instantly dry the ink after printing so as to permit use of such presses on non-absorbent paper" (p. 7). The record shows definitely that there was no ink useable on fast printing presses which could be dried instantly by heat (*ante*, p. 3). Naturally, therefore, presses were not provided with heaters for this purpose.

But heat had some effect in helping the drying of ordinary linseed oil ink and was useful for some other purposes,[2] and as a result heaters both of the gas flame type and roller type were used on printing presses long before the Gessler ink appeared.[3] There was no difficulty whatever in using the old devices to dry the new Gessler ink.[4]

No one other than petitioner's witness, Kerley, attributed the success of the ink to the development of some particular heating device. He referred to some heater made in 1937 as essential (I, p. 551), although the ink had been in successful use at the plant of the Curtis Publishing Company since 1934 (I, pp. 88, 102). Kerley's statements as to heating ovens are on a par with his statement that none of the inks made under the Gessler patent and com-

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[2] See footnote 1 on page 2.

[3] Gas heaters: I, p. 162. II, pp. 998-1012.
Hot rollers: I, p. 97, II, pp 993-997, 1013-1015.

[4] The first press on which the ink was demonstrated had a cooling roller. It was necessary only to run steam instead of cooling liquid through this roller. As the use of the Gessler ink spread, heaters were improved and "refined" but remained essentially of the old types, gas heaters and steam-heated rollers (I, p. 94). See also: I, pp. 79-80, 192-193; 68-70, 606, 617.

mercially used for years were successful until he himself had made a similar ink (I, p. 550, see pp. 563-566).

3. The third erroneous statement relied on in the argument against validity is that not Gessler but a Mr. Cray made the invention of the patent. By ignoring the proof showing that heating devices had long been used on printing presses, the petitioner can assert that the information which Mr. Cray gave Gessler as to this feature of the prior art was the real basis of the invention. This assertion cannot be reconciled with the fact that Cray himself, in spite of all his familiarity with ink-making and with the use of heaters, had never been able to make a quick-drying ink for high-speed presses until after he had obtained Gessler's ink (I, p. 99).

The manner in which Dr. Gessler made the invention is clearly described in his own testimony (I, pp. 707-709), which is supported by the notebook which he kept at the time (I, pp. 701-706). The Petition contains no justification for the slur which it seeks to cast upon this testimony of a distinguished chemist whose probity was not attacked or questioned at the trial.

When it is recognized that Gessler did not merely compound an ink but discovered and disclosed how to select the principal ingredient which created an ink whose novelty and value were at once recognized by printers, that heating devices had long been used on presses and were immediately available to dry the new ink, and that the information which Gessler received from Cray was merely as to the prior art, petitioner's assertion that the creation of the patented ink required merely a low order of skill is seen to be directly at variance with the record.

Petitioner's Point II.

We have pointed out above that the claims of the Gessler patent fully comply with this Court's decisions as to the definiteness required in claims (*ante*, pp. 4-6).

Petitioner argues that the claims are rendered indefinite by construing them to cover petitioner's ink. This argument is based on an asserted difference between petitioner's ink and the patented ink which does not in fact exist:

1. Petitioner compares petitioner's ink solvent with water and argues that, since this solvent has the same vapor pressure as water, and water does not evaporate as quickly as alcohol, the vapor pressure of the solvent cannot approximate that of alcohol.

The supposed analogy to water on which this argument is based was exploded at the trial. Petitioner's expert made a court test in which alcohol evaporated more rapidly than water (I, pp. 317-318), and said that this demonstrated a difference in volatility at elevated temperatures between the solvent of the patented ink and that of petitioner's ink (I, p. 318). When the expert's attention was called on cross-examination to the fact that the moisture in the air of the room delayed the evaporation of water, he suggested toluol as a liquid having the same vapor pressure as water and not present in the air of the room (I, pp. 373-374). The volatilities of toluol and alcohol were then demonstrated in court and it was shown that there was no appreciable difference between them (I, pp. 665-666), plainly showing that the water analogy is false, and that petitioner's solvent has at 150° C. the vapor pressure of a solvent as volatile as alcohol, and thus approximates the vapor pressure of that typical volatile liquid.

2. The Petition repeatedly asserts that petitioner's ink does not, like the patented ink, dry instantly at the temperature to which paper may safely be heated (150° C.) but requires a heat of 1700° F. (900° C.). This statement is contrary not only to the record but also to the laws of nature:

The vapor pressure and rate of evaporation of an ink solvent depend upon its temperature. When a thin film of ink has been printed on paper, the temperature of the ink and the paper are necessarily substantially the same. When this temperature exceeds 150° C. the paper is scorched.

To raise the ink and paper from room temperature to a higher temperature, it is necessary to apply heat to them.

There are two generally used commercial methods for heating the ink and paper:

(1) One is to pass the web of paper around a roller or steam drum heated to the temperature to which the ink and paper are to be heated. Sufficient heat is transferred from the hot roller to the paper in contact with it to heat the paper and ink to substantially the same temperature as the roller while the web is passing around the roller.

(2) The other method is to pass the ink and paper close to a gas burner in a gas-heated furnace. In this case, the heat is transferred to the ink and paper, not from hot metal, but from hot gas. In order to raise the temperature of the paper and ink to 150° C. while the web is passing through the furnace, it is necessary that the gas be at a temperature far above 150° C. (I, pp. 68, 70). If paper were raised to the temperature of the gas, it would burn. This is plain from the use of safety devices on such furnaces to extinguish the gas immediately if the web slows down or stops (I, pp. 93-94).

If the statement in the Petition to the effect that a heat of 1700° F. is necessary to dry petitioner's ink quickly were true, the ink would be wholly useless, as it could not be dried quickly without burning up the paper on which it is printed.[1]

The statement in the Petition to the effect that a heat of 1700° F. is necessary to dry petitioner's ink quickly is directly contrary to the record. The testimony of petitioner's witness, Kerley, at I, pp. 550-551, is the only authority for this statement cited in the Petition (p. 4, p. 24). The witness referred to 1700-1900° F. as the heat of the *flame* in the burners. But in the same answer, the witness admitted that the traveling web does not reach anywhere near this temperature.

Actually, petitioner's ink, like that described in the patent, dries instantly at 150° C. This is conclusively proved by demonstrations in court (I, pp. 32-40, 51) and by commercial use of the ink on the same press on which the patented ink had been used (I, pp. 237-238).

When it is recognized that the analogy between the evaporation rate of water and of petitioner's solvent is false, and that there is no practical or observable difference between petitioner's ink and the ink of the patent, it is evident that the decision of infringement was correct and that it did not render the claims indefinite.

Petitioner's Point III.

The Circuit Court of Appeals for the Second Circuit fully complied with Rule 52(a). Its opinion pointed out in detail that the so-called findings of fact of the district court were clearly erroneous (*ante*, p. 10).

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[1] See colloquy between court and petitioner's vice-president on I, p. 530.

NO GROUND FOR CERTIORARI.

The opinion of the Circuit Court of Appeals for the Second Circuit sets out clearly the facts which led that court to sustain the Gessler patent. In sustaining the patent under the facts found, the court followed the decisions of this Court dealing with similar sets of facts, and violated no rule of law established by this Court in any patent case.

The Petition raises no question of law but is an attempt to induce this Court to consider the fact and expert evidence in the record and to review the conclusions of fact unanimously reached by three judges of an able court which has carefully considered this evidence.

The Petition states no recognized reason for asking this Court to assume this burden. The allegations of public interest under "Reasons for Granting the Writ" on page 16 of the Petition are obviously such as could be made by any defendant in any patent case. Charges of "monopolistic tribute" are particularly inapposite in the present case, for (a) the use of the patented ink in printing magazines sold to the public at popular prices shows that the respondent has made the benefits and economies of the Gessler invention available to the public, and (b) the competition of high-speed rotogravure printing with the high-speed typographic printing done by means of the patented ink (evidenced by the concurrent use of both in printing *Collier's*[1]) excludes respondent from any monopolistic position in magazine printing.

It is, of course, true that the public interest is involved to a certain extent in every patent infringement suit (as in many other sorts of private litigation). In general, errors in sustaining patents injure the public by the grant of unau-

[1] I, pp. 235-238, 634-637.

thorized exclusive rights, while errors in invalidating patents legalize the stealing of real inventions and injure the public by reducing the inducement to invent and introduce new inventions upon which progress of the useful arts depends.

In spite of this inherent public interest in all patent litigation, Congress has not granted a right of appeal to this Court in patent cases, and this Court has not, in its rules, specified errors in sustaining or invalidating patents as a ground on which the discretionary power of *certiorari* will be exercised. Some special or unusual circumstance is necessary to justify placing on this Court the burden of reviewing the evidence in a patent case, and no such circumstance exists or is alleged in the Petition in the present case.

Respectfully submitted,

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